

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

COPY

**IN THE MATTER OF:
MICHAEL KELLEHER,**

Grievant,

v.

**STATE OF DELAWARE DEPARTMENT
OF HEALTH AND SOCIAL SERVICES,**

Agency.

DOCKET NO. 01-08-214

**ORDER GRANTING
MOTION TO DISMISS
APPEAL**

BEFORE Brenda Phillips, Chairperson, Dallas Green, John F. Schmutz, Esquire, and John W. Pitts, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. § 5908(a).

APPEARANCES:

For the Grievant:
Michael Kelleher, *pro se*

For the Agency:
Ilona M. Kirshon, Esquire
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

This grievance appeal pertains to a dispute by Michael Kelleher concerning the level of compensation he should receive upon his return to the Merit System after a stint as Acting Deputy Director of the Division of Alcoholism, Drug Abuse and Mental Health ("DADAMH").

On December 16, 1998, Mr. Kelleher took a leave of absence from the Merit System in accordance with Merit Rule 6.0441, to become Acting Director of DADAMH. He served in that

capacity until July 1, 1999 when he returned to the Merit System as DADAMH Chief of Administration.

Upon Mr. Kelleher's return to the Merit System position he continued to be paid at the same pay rate he had been receiving while serving as Acting Director. On December 22, 1999, Mr. Kelleher was informed that he had been over paid during the period July 1, 1999 to December 22, 1999. On January 14, 2000, Mr. Kelleher received payroll documents indicating that his pay had been reduced by 9% from this pay during the period July through December of 1999.

Mr. Kelleher complains of violations of Merit Rule 6.0441 and Merit Rule No. 13.0320. The Agency moved to dismiss Mr. Kelleher's grievance appeal on January 3, 2001 on the grounds that it was not timely filed and that Mr. Kelleher has failed to state a claim upon which relief may be granted. The Board heard argument from the parties on the motion on February 1, 2001. This is the decision and order of the Board, which, for the reasons set forth below, denies in part and grants in part the motion and dismisses the present appeal.

MERIT RULES AND STATUTES

MERIT RULE NO. 6.0441

An appointing authority may request, and the Director may grant, an extended leave of absence to a classified employee to serve in any non-classified position described in 29 *Del. C.* §5903(4) (5) and (6). Upon the completion of that appointment, the Director shall place the employee in a classified position for which the employee meets the minimum qualifications. Upon re-entry into the Merit System, the employee's salary shall be set at a percentage of paygrade midpoint that the employee's salary represented at the time the employee took leave from the Merit System. Thereafter, the employee shall receive salary increases based upon the Budget Act and applicable Merit Rules.

MERIT RULE NO. 13.320

The appointing authority shall notify the incumbent in writing in advance, stating the reasons for demotion. Such notice shall include the information regarding appeal rights, as provided in Merit Rule No. 21.0100.

DISCUSSION

The relevant facts necessary for the resolution of the present grievance appeal are not in dispute. The essence of the grievance appeal is Mr. Kelleher's desire to retain the approximately 9% change in compensation which he lost when the Agency "corrected" what it contends was an accounting mistake it had made in computing his pay upon return to his Merit System status. There is no dispute that the actual change in compensation was finally implemented in January 2000. Mr. Kelleher's grievance was not filed until March 23, 2000. The Merit Rules require that in order to be effective, a grievance must be filed within 14 calendar days of the dated of the matter being grieved or the date the grievant had actual knowledge of the matter being grieved. (Merit Rule No. 20. 6) The failure of a grievant to comply with the filing requirement time limits voids the grievance. (Merit Rule No. 20.4) Because it is fundamental that the Merit Employee Relations Board can only hear and consider appeals which are timely and properly filed under the Merit Rules and applicable statutes.

In this instance, there were a series of meetings suggested by management extending over an approximate three month period during which Mr. Kelleher continued to seek informal resolution of the issue of his proper pay rate. A meeting was scheduled for March 13, 2000 to review detailed written information concerning Mr. Kelleher's return to Merit status prepared by the Department Human Resources staff. On March 13, 2000 Mr. Kelleher met with Mr. Love, Ms. Faircloth, and Ms. Marshall. It became clear at that meeting that there was to be no management action to modify the 9% pay reduction which was implemented in January of 2000. On March 23, 2000, Mr. Kelleher filed his formal written grievance. Under the circumstances, the Board finds such filing to be timely and to that extent, the Motion to Dismiss is denied.

It is apparent to the Board that the situation in which Mr. Kelleher found himself upon his

return to the Merit System after his stint as the non-merit Acting Director may have created an expectation on his part that the level of compensation he had been receiving as the Acting Deputy Director would continue. Indeed, in his argument against the Motion to Dismiss, Mr. Kelleher asserted that he actually continued to perform the duties of the Director of DADAHMA into December of 1999 even though his acting Director status was to have ended in July of 1999.

However, an expectation is not an entitlement, and under the circumstances presented, the mistake of the Agency in continuing the same rate of pay for the position of lesser responsibility cannot be reasonably thought to rise to the level of an entitlement beyond that period after which the pay decrease was actually effected. As to the period after December 1999, there is no dispute that Mr. Kelleher was no longer serving as Acting Director. Therefore, to that extent, the situation is governed by the provisions of Merit Rule No 6.0441 and Mr. Kelleher's salary reduction does not exceed the level specified by the relevant Merit Rule upon re-entry to the Merit System, and to that extent, the Department's Motion to dismiss is granted.

The Agency has argued that the retroactive reduction in pay for the period July 1999 through December 2000 has not been effected and is therefore not before the Board at this time. The Board agrees. However, in light of the information presented at the hearing by Mr. Kelleher, there appear to be material issues of fact surrounding the duties he actually performed during that period and a significant factual question of whether his acting Director status truly terminated in July of 1999 or continued *de facto* through December of that year.

The Agency, through counsel, has agreed that in the event there is any attempt to recoup the pay differential from Mr. Kelleher for the period July 1999 through December 1999 Mr. Kelleher may file a grievance concerning such action. The Agency will not oppose on the basis of the timeliness

of the filing of any such grievance which Mr. Kelleher files within 14 calendar days of receipt of written notification of an intent to seek recoupment of the salary differential between pay grade 22 and pay grade 21 for the period of July through December of 1999. Based upon this representation, and for the reasons stated above, the present grievance appeal will be dismissed. The Board finds that Mr. Kelleher's return to merit status was in accordance with Merit Rule No 6.0441 at least for the period after December of 1999 and did not constitute a demotion.

ORDER

As stated above, the Motion of the Department to dismiss the appeal is granted and the appeal is hereby dismissed by unanimous vote of the undersigned members of the Board.

BY ORDER OF THE BOARD this 21st day of February, 2001.

Brenda Phillips, Chairperson

Dallas Green, Member

John F. Schmutz, Esquire

John w. Pitts, Member

APPEAL RIGHTS

29 Del. C. § 10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the

record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date:

2/22/01

Distribution:

Original:File

Copies: Grievant

Agency's Representative

Board counsel

Merit Employee Relations Board